

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CHRISTOPHER BROWN,

Charging Party,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-5656-E

PERB Decision No. 2359

March 19, 2014

Appearances: Christopher Brown, on his own behalf; Office of the General Counsel by David V. Greco, Assistant General Counsel, for Los Angeles Unified School District.

Before Martinez, Chair; Huguenin, Winslow and Banks, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Christopher Brown (Brown) to a proposed decision by a PERB administrative law judge (ALJ). The complaint and underlying charge alleged that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA)<sup>1</sup> when it issued Brown a below-standard performance (Stull) evaluation and failed to reelect him to a permanent position<sup>2</sup> in retaliation for engaging in the protected activity of filing grievances. After a formal hearing, the ALJ issued a proposed decision concluding that the charge was not timely filed. The case was dismissed on that basis alone.

The Board has reviewed the entire record in this matter, including the complaint and answer, the hearing record, Brown's exceptions and the District's response thereto. Based on that review, we reverse the proposed decision and direct the ALJ to reopen and develop the record

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<sup>1</sup> EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

<sup>2</sup> On September 28, 2012, Brown withdrew the allegations concerning his non-reelection.

on the timeliness issue<sup>3</sup> and render a new decision after consideration of Brown's evidence on tolling and any rebuttal the District may wish to present.<sup>4</sup> Because a case that is dismissed by operation of the statute of limitations deprives a charging party of the right to receive a decision on the merits of the unfair practice charge, we are unwilling to consider the proposed order of dismissal without a fully developed evidentiary record on tolling.

Furthermore, this case illustrates the flaws in Board precedent governing the allocation of the burden of proof on the timeliness issue. The latest iteration of the timeliness rule is set forth in *Long Beach Community College District* (2009) PERB Decision No. 2002 (*Long Beach II*). *Long Beach II* places on the charging party the burden of proving timeliness even after the Office of the General Counsel has determined that the charge is timely and a complaint has issued based on the charging party having set forth a prima facie unfair practice under the applicable labor relations act.

Here, the Office of the General Counsel determined that Brown's charge was timely filed and issued a complaint.<sup>5</sup> The District raised the statute of limitations as an affirmative defense in its answer to the complaint. Generally at the formal hearing parties are instructed that the issues to be decided are those in the PERB complaint. The issues in the PERB complaint are limited to whether an unfair practice has been, or is being, committed. Here, the issue is whether the District retaliated against Brown for engaging in the protected activity of filing grievances. By

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<sup>3</sup> An ALJ is empowered to "[i]nquire fully into all issues and obtain a complete record upon which the decision can be rendered." (PERB Reg. 32170, subd. (a); PERB Regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

<sup>4</sup> The hearing record on the retaliation issue remains closed.

<sup>5</sup> Although nowhere is such a timeliness determination explicitly set forth, it is implicit in the issuance of a complaint. PERB is statutorily prohibited from issuing a complaint "in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." (EERA, § 3541.5, subd. (a)(1).) Where the Office of the General Counsel determines that a charge is untimely, the charge is subject to dismissal. (PERB Reg. 32620, subd. (b)(4).)

placing the burden on Brown to prove a matter outside the complaint, i.e., that his unfair practice charge is not untimely contrary to what the District asserted in its answer, the Board has created a system that is a trap for the unwary.

Therefore, as explained below, we take this opportunity to overturn *Long Beach II* as it relates to the allocation of the burden of proof on the timelines issue and return PERB to a more logical analytical framework. Charging party's duty to provide the Office of the General Counsel with sufficient facts upon which to make a determination of timeliness is a bedrock principle. We do not disturb that principle here. We hold that the charging party's duty to establish timeliness has been discharged at the point at which the Office of the General Counsel has determined that the charge is not subject to dismissal for lack of timeliness and issues a complaint. Where the matter goes to a formal hearing, the presentation of evidence and allocation of burdens flow from the operative pleadings, the complaint and the answer. At this stage of the proceedings, we see no justification for treating the statute of limitations as anything but a "true" affirmative defense, which the respondent has the burden to plead and prove. If not pleaded, it is waived. At the formal hearing, the respondent has the initial burden of going forward with evidence on the timeliness issue and the burden of proving by a preponderance of the evidence that the charge is untimely.

Where the issue of tolling is raised by the procedural circumstances of the case (i.e., charge filed outside six-month limitations period, grievance machinery utilized, PERB complaint issues), as here, allocation of the burden of proof need not be altered from the newly announced framework. The charging party has no greater knowledge or evidence than the respondent on the tolling issue given the respondent's status as a party to the grievance and participant in the grievance machinery. Therefore, in satisfying its burden of proof on the timeliness issue where a grievance has been filed, the respondent must prove that the charge was filed outside the six-month limitations period and that the tolling exception does not apply.

## FACTUAL BACKGROUND

Brown was an adult education teacher employed by the District in the Division of Adult and Career Education. Teachers at the District are in a bargaining unit represented by the United Teachers of Los Angeles (UTLA). The District and UTLA were parties to a collective bargaining agreement (CBA) that was in effect at all relevant times. Brown began his employment with the District in 2007 at Fremont-Washington Community Adult School. He taught mathematics and reading labs. Initially Brown was employed on a contract basis but he applied and was accepted into a tenure-eligible teaching position in 2009.

The 2009-2010 school year was Brown's first probationary year. On June 1, 2010, Brown received a final performance evaluation. Principal Mike Wada (Wada) signed the evaluation as the reviewing administrator. Assistant Principal Voncile Burkett (Burkett) signed the evaluation as evaluator. Brown received the highest possible rating except in one category (record-keeping). In response, Brown filed a grievance on June 16, 2010, asserting that the District violated certain timeframes specified in the CBA. Wada settled the grievance with Brown by agreeing to remove the performance evaluation from Brown's personnel file.

Brown filed three additional grievances between July 1 and July 19, 2010, for administrators "publicly reprimanding/criticizing" him in class. Two of the grievances were denied. The third, which involved conduct by Burkett, resulted in Wada issuing a written statement stating that "we truly regret any embarrassment or inconvenience that may have occurred to the grievant" and that the administration would be more careful in the future.

Brown worked a summer assignment between the 2009-2010 and 2010-2011 academic years. On August 17, 2010, during the summer session, Wada issued Brown a letter of reprimand based on certain deficiencies observed by Catherine "Kitt" Bell, who supervised curriculum and instruction at the District. At a conference with Brown about the letter, Brown told Wada he believed the reprimand was issued in retaliation for the grievances he filed during the preceding

school year. Wada memorialized Brown's retaliation comments in a conference memorandum dated August 18, 2010.

On September 13, 2010, Brown entered his second probationary school year. After two formal observations by Assistant Principal Jose Alcazar, on February 23, 2011, Wada issued Brown an evaluation, assigning him the lowest possible rating in every category except one (timely arrival and class start). Wada signed the evaluation both as the evaluator and reviewing administrator. That evaluation included the letter of reprimand and the conference memorandum described in the preceding paragraph.

On February 15, 2011, the District informed Brown that he was being considered for non-reelection. On March 8, 2011, the District issued Brown a notice of non-reelection.

On March 14, 2011, Brown grieved the 2010-2011 performance evaluation, alleging that it was issued "without cause" and failed to comply with evaluation procedures under the CBA.<sup>6</sup> On March 24, 2011, Wada denied the grievance at Step One. Brown did not appeal the denial to Step Two.<sup>7</sup>

In the proposed decision, the ALJ found that at some point after the denial, Brown submitted the matter to UTLA's "grievance review committee," which informed Brown in March 2012 that "they couldn't go forward." The ALJ observed that the hearing record does not contain an explanation of the function of UTLA's grievance review committee.

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<sup>6</sup> Grievance #2010-100189.

<sup>7</sup> The grievance procedure under the CBA, contained in Article V, culminates in binding arbitration. Only UTLA, with the concurrence of the individual grievant, may advance a grievance to arbitration. There are two levels, or steps, which precede arbitration. Once the District responds to a grievance at Step One, the grievant has five days to advance the matter to Step Two. Once the District responds at Step Two, UTLA must request arbitration within five days. The District and UTLA may agree in writing to extend, shorten or waive any step or timeline in the grievance process. If the grievant fails to advance the grievance within the time specified, the grievance terminates. If the District fails to respond at any step, the grievance may proceed directly to arbitration. Article V includes a "No Reprisals" provision, which states: "There shall be no reprisal against an employee for utilizing these grievance procedures or for assisting a grievant pursuant to these procedures."

## PROCEDURAL HISTORY

On February 16, 2012, approximately a year after the District issued Brown the negative performance evaluation, Brown filed the present unfair practice charge. On September 28, 2012, the Office of the General Counsel issued a complaint alleging that the District gave Brown the negative evaluation because he engaged in the protected activity of filing grievances. On October 10, 2012, the District filed an answer to the PERB complaint denying the substantive allegations and asserting multiple affirmative defenses, including that the charge was untimely filed.

An informal settlement conference was held on November 2, 2012, but the matter was not resolved. Thereafter, a formal hearing was held on February 20-21, 2013. On the first day of hearing, the ALJ took official notice of the content of the case file. On April 22, 2013, the parties filed simultaneous closing briefs. At that point, the record was closed and the matter was submitted for decision.

The ALJ's proposed decision issued on June 12, 2013, concluding that the charge was untimely filed and the complaint and charge should be dismissed. On July 22, 2013, Brown timely filed a statement of exceptions and request for oral argument.<sup>8</sup> On August 9, 2013, the District timely filed its response to the statement of exceptions. By letter from the Appeals Assistant dated August 27, 2013, the parties were informed that the filings were complete and the case was placed on the Board's docket on August 9, 2013.

## THE PROPOSED DECISION

The ALJ noted that the District had raised the statute of limitations as an affirmative defense in its answer. The analysis centered on whether an exception to the statute of limitations

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<sup>8</sup> Brown's request for oral argument is denied. The Board historically denies requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (See, e.g., *Monterey County Office of Education* (1991) PERB Decision No. 913.)

applied. Under the statutory tolling doctrine, the statute of limitations is suspended during the time the same issue is being pursued using a grievance procedure that ends in binding arbitration. The ALJ concluded that although Brown's grievance concerning the 2010-2011 performance evaluation did not allege a violation of the "No Reprisals" provision of the CBA, his retaliation allegations were nonetheless included in his grievance by incorporation of Wada's letter of reprimand and conference memorandum, which memorialized Brown's retaliation comments. The ALJ next concluded, however, that the statute of limitations was not tolled for a period of time long enough to make the charge timely.

The proposed decision states:

... Brown failed to provide several key details about when the 2011 grievance concluded. Brown did not establish, for instance, that he timely advanced his grievance beyond Step One, either by submitting it at the next step within the five-day time period, or by requesting and receiving a waiver of that deadline from LAUSD. The grievance terminates if not timely advanced beyond Step One.

Brown asserts that he submitted the matter to UTLA's grievance review committee but he did not explain what that committee does in relation to the grievance process. The grievance review committee is not described in the CBA. Brown has not met his burden of proving that his involvement with that committee was more than merely an informal process outside the negotiated grievance procedure.

The ALJ noted that information provided during the investigation stage of an unfair practice charge is not evidence. As the ALJ observed in the findings of fact, Brown's second amended charge includes a letter from UTLA dated March 30, 2012, stating that "they couldn't go forward." The ALJ concluded, however, that his decision to take notice of the case file demonstrates that "Brown *alleges* that UTLA reviewed his grievance until March 30, 2012, but is not *evidence* that UTLA actually did so." (Proposed decision, p. 14 [emphasis in the original].)

The proposed decision states:

Brown did not provide *evidence* of UTLA's actions during the hearing even after being instructed by the Administrative Law Judge

that “the contents of the case file is not evidence in this case, meaning if you submitted a document in your charge or in the District’s response, those documents are not evidence on which I can rely unless you independently submit them again during the course of this hearing.”

Finally, the proposed decision concludes that even if UTLA’s grievance review committee plays some official role in advancing grievances, Brown failed to establish when he submitted his grievance to the committee, that he did so in a manner that would have allowed him to pursue the grievance further or that the committee complied with or received a waiver of the applicable timeframes. The proposed decision states, “[w]ithout this information it remains unclear when it became apparent that the possibility of a remedy via the grievance process was foreclosed.”

#### BROWN’S EXCEPTIONS

Brown filed 12 exceptions. The first 11 take issue with the ALJ’s findings of fact. The challenged factual findings concern the retaliation issue.<sup>9</sup> We need not address them at this juncture.<sup>10</sup>

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<sup>9</sup> Exception 3 does have some bearing on the timeliness issue as well as the retaliation issue, as Brown points out. Brown objects to the manner in which the ALJ summarized the grievance process. The Board’s own summary is provided, *ante*, at footnote 7. Although we find no merit in Brown’s exception, we include the following excerpt from the CBA to remove any possible doubt as to PERB’s understanding of the grievance mechanism. The CBA provides:

Step Two: If the grievance is not resolved at Step One, the grievant may, within five (5) days after the termination of Step One, present the grievance to the appropriate Superintendent, Division Head or designee. Within five (5) days from receipt of the grievance, a meeting shall take place to discuss the matter. The administrator shall reply in writing within five (5) days following the meeting. The receipt of such reply will terminate Step Two.

It is undisputed that Brown did not elevate his grievance to Step Two.

<sup>10</sup> After conclusion of the formal hearing upon remand, the ALJ may decide that his original conclusion regarding timeliness is correct. If, however, the ALJ determines that the tolling exception does apply and Brown’s charge is timely, the ALJ will be tasked with analyzing both the timeliness and retaliation issues in the new decision. In either case, the ALJ may review Brown’s exceptions to the factual findings, and the District’s response to those exceptions, to ensure that the factual findings included in the new decision are free of any possible error.



Exception 12 takes issue with the ALJ's conclusion that the charge is untimely. Brown argues that under Evidence Code section 500, the District carries the burden of proving its affirmative defense, and that no testimony was brought forward at the formal hearing on the timeliness issue. Brown asserts that the District's post-hearing brief was the only sign that the timeliness of his charge was still at issue.<sup>11</sup> Brown claims to be in possession of documentary evidence relevant to the tolling question, which he contends will demonstrate that his charge was timely filed. Brown asks:

The administrative hearing lasted almost two days and Respondent raised no issue of the Limitations during trial. If Respondent believed there was a valid issue, why would the parties have had to waste all of the time with the hearing?

#### THE DISTRICT'S RESPONSE

The District responds to all 12 exceptions, but for reasons discussed above, we summarize the District's response to Exception 12 only. The District urges the Board to disregard Brown's timeliness objection for three reasons. According to the District, Brown incorrectly asserts that the District has the burden of proof to establish that Brown's charge was untimely filed. The District contends that the ALJ correctly placed the burden of proving timeliness on Brown. Second, the District argues that whatever documentary evidence Brown may have is not in the record and therefore cannot be considered. The District relies on PERB Regulation 32300, subdivision (b), which provides: "Reference shall be made in the statement of exceptions only to

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Should Brown file exceptions to the new decision, he will be precluded from raising any new exceptions to the findings of fact to the extent they remain unchanged but may renew his current exceptions if he believes they continue to have merit. Should the District file exceptions to the new decision, it too will be precluded from raising exceptions to the findings of fact to the extent they remain unchanged. (See PERB Reg. 32300, subd. (c) ["[a]n exception not specifically urged shall be waived"].)

<sup>11</sup> The District raised other traditional affirmative defenses in its answer to the complaint in addition to the statute of limitations, including, for example, failure to exhaust administrative remedies, laches and unclean hands. These matters were not pursued by the District at the formal hearing, nor were they argued in the District's post-hearing brief.

matters contained in the record of the case.” Last, the District argues that Brown inappropriately pleads for the Board’s sympathy based on his in propria person status. According to the District, Brown’s lack of understanding on the statute of limitations issue is no excuse for his failure to present his additional evidence at the formal hearing.

## DISCUSSION

### 1. Statutory Tolling

The conduct underlying the unfair practice charge, the issuance of the negative performance evaluation, occurred on February 23, 2011. Brown did not file his unfair practice charge until February 22, 2012. Unless an exception to the six-month limitations period<sup>12</sup> applies, Brown’s charge is untimely. Under the statutory tolling doctrine, the statute of limitations is suspended during the time the same issue is pursued utilizing a grievance procedure that ends in binding arbitration (*Los Angeles Unified School District* (1991) PERB Decision No. 894); that is, from the time the charging party filed the grievance until the time the grievance machinery of the collective bargaining agreement has been exhausted. (*Sacramento City Unified School District* (2001) PERB Decision No. 1461.)

The statutory tolling doctrine derives from EERA section 3541.5, subdivision (a)(2), which provides in pertinent part:

[T]he board shall not . . . [¶] [i]ssue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. . . . The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

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<sup>12</sup> EERA section 3541.5, subdivision (a)(1).

As is clear from the text of this provision, the statutory tolling doctrine only applies where the grievance and the later-filed charge raise the same issue. (*Peralta Community College District* (2001) PERB Decision No. 1462 [“PERB will not toll the statute of limitations [under EERA section 3541.5(a)(2)] in a discrimination case when the District is unaware of the specific discrimination allegation”]; *North Orange County Community College District* (1998) PERB Decision No. 1268; *Los Angeles Unified School District* (1991) PERB Decision No. 887.) Here, Brown grieved his below-standard performance evaluation utilizing the grievance procedure under the CBA. Although Brown’s grievance did not reference the “No Reprisals” provision, Wada was otherwise informed of Brown’s retaliation claim. Wada’s conference memorandum expressly acknowledged Brown’s claim that the letter of reprimand was issued in part in retaliation for Brown’s earlier grievance activity. Because Wada included both the letter of reprimand and the conference memorandum as supporting material for the evaluation, Wada expressly incorporated Brown’s retaliation allegation into the evaluation itself. The evaluation documents provide adequate notice that retaliation was among the issues raised by Brown’s grievance. We agree with the ALJ that Brown’s grievance and later-filed unfair practice charge raise the same retaliation issue.<sup>13</sup> Accordingly, the statutory tolling doctrine applies and the statute of limitations is suspended until the grievance machinery of the collective bargaining agreement has been exhausted.

The determination of the point in time at which the parties exhausted the grievance machinery is the decisive issue in this case. In *San Dieguito Union High School District* (1982) PERB Decision No. 194 (*San Dieguito*), the Board held that the statute of limitations should toll

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<sup>13</sup> We note that the District did not except to the ALJ’s conclusions of law on this discussion point.

“until after it became clear that the possibility of a remedy via [the grievance procedure] was foreclosed.”<sup>14</sup>

Under the CBA, a grievance terminates if not timely advanced beyond Step One. Brown testified as follows on cross-examination:

Q And did you -- This went through a step one process, correct?

A Yes.

Q And can you turn to Exhibit 15? This is a letter, and I understand it's addressed to Mr. Miceli who is your UTLA rep, correct?

A Yes.

(Thereupon, the above-referenced document was marked as Respondent's Exhibit 15 for identification.)

BY MR. GRECO:

Q And it's dated March 24th, 2011. And it's from Mr. Wada, correct? Did you receive this letter?

A No, I've never seen this before in my life.

Q Okay. Did you go to a step two process in the grievance?

A No.

Q What was your next communication with UTLA regarding this grievance?

A It was the grievance review committee.

Q So, it went straight from a step one to a grievance review committee?

A Yes.

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<sup>14</sup> *San Dieguito* concerned the equitable tolling doctrine, by which the statute of limitations is tolled during participation in a negotiated dispute resolution process that does not end in binding arbitration. As in statutory tolling cases, PERB has held that equitable tolling only applies in retaliation cases where the dispute resolution process puts the employer on notice that retaliation is an issue. (See *Trustees of the California State University (San Jose)* (2009) PERB Decision No. 2032-H.)

Q Okay. And how did the grievance review committee react? Or what was their response?

A I didn't get a response from them for, until last March, or something. It was almost a year, it was a year or so.

Q And what was the decision that you received in March of last year?

A That they couldn't go forward.

The District argued in its post-hearing brief that Brown failed to establish the timeliness of his charge. In making that argument, the District relied on Brown's testimony quoted above in asserting that Brown's grievance did not advance to Step Two under the CBA and "thus, was deemed withdrawn or closed."

The District also relied on the testimony of its main witness, Wada. Wada's testimony, however, raises more questions than it answers. He testified as follows:

Q Mr. Wada, just so we can get it a little bit on the record for an understanding, when a grievance is filed, who are the communications with on behalf of the District?

A It's going to be, it's going to involve on the part of the District whoever plays field director in now Employee Performance Accountability and the specific administrator that has been grieved.

Q But who do they communicate with?

A With UTLA.

Q Okay. And UTLA is acting on behalf of the LAUSD employee --

A Of their member.

Q -- who is --

A That is correct.

Q -- the grievant, correct?

A That is correct.

Q Okay. And do you know whether or not Mr. Brown's grievance for the Stull Evaluation of the 2010-2011 school year went to a step two?

A I have knowledge that he chose not to go to step two and go to the grievance review committee.

Q And do you know what the status of that grievance is currently?

A I do not have any firsthand knowledge.

As can be seen from the above excerpts, the hearing record concerning the key question on the tolling issue, i.e., at what point in time was the grievance machinery exhausted, is unsatisfying and inconclusive. If the District's argument is correct that the grievance was closed or withdrawn after Brown failed to appeal the Step One denial by Wada to Step Two, it is noteworthy that Wada responded to the question about the status of the grievance by testifying "I do not have any firsthand knowledge" rather than by testifying that the grievance was dead, or words to that effect. Regardless of which party has the burden of proof, there must be an adequate evidentiary record, especially on such a pivotal issue.

Moreover, under the grievance procedure, a grievance may proceed to arbitration in one of two ways. Once the District denies the grievance at Step Two, the exclusive representative has five days to request arbitration. Or, if the District fails to respond at any step, the grievance may proceed directly to arbitration. We know that the District did not fail to respond at Step One and Brown did not advance the grievance to Step Two. The District and the exclusive representative may also, however, agree in writing to extend, shorten or waive any step or timeline in the grievance process. The fact that Step Two was not triggered, that Brown's grievance was allegedly before the exclusive representative's grievance review committee, and that Brown was informed by that committee in March 2012 that it had decided *not* to go forward with Brown's grievance, hints at the possibility that the grievance was still alive until that point in time. As Wada testified, all communications concerning grievances are between the District and the

exclusive representative. For example, Wada's Step One denial is addressed in a letter to the exclusive representative and not to Brown. Brown was not copied on the letter. Brown testified he never received it. Of the two parties involved here, the District is the party most likely to know the real status of the grievance at any particular point in time during the exhaustion of the grievance machinery.<sup>15</sup>

We agree with the ALJ that Brown did not establish when, if ever, he submitted his grievance to the grievance review committee or that he did so in a manner that would have allowed him to pursue the grievance further. We also agree that Brown did not establish that the exclusive representative's grievance review committee complied with or received a waiver of the applicable timelines contained within the CBA grievance procedure, or otherwise timely pursued the grievance.

The problem with this case, however, transcends the evidentiary record. There is no dispute that the charge was filed outside the six-month limitations period. (See fn. 5.) Ordinarily, on those facts alone, the charge would have been subject to dismissal. Instead, in issuing the complaint, the Office of the General Counsel necessarily found that the statutory tolling exception to the statute of limitations applied. In response to the complaint, the District filed a typical boiler-plate answer including all variety of affirmative defenses, including ones that are clearly inapplicable on the record before us like unclean hands. Despite the fact that the charge was filed outside the six-month limitations period, the District did not opt to file a motion to dismiss on timeliness grounds to try to dispense with the case before a time-consuming hearing on the merits. At the two-day formal hearing, the retaliation issue was fully tried. Brown put on no evidence regarding the timeliness issue, but the parties generally are instructed that the matters to be tried are limited to those contained in the complaint. Although there was some testimony at the formal

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<sup>15</sup> The exclusive representative has equal knowledge, but is not a party to this case.

hearing elicited by counsel for the District regarding the grievance procedures and the status of the grievance, the entirety of which is quoted above, it is unclear whether it was offered for background information, for its relevance to the retaliation case or for its relevance to the timeliness issue. From a purely pragmatic standpoint, we appreciate the tension underlying Brown's question, "[i]f Respondent believed there was a valid issue, why would the parties have had to waste all of the time with the hearing?" Brown is not pleading for sympathy, as the District contends. He is pleading for logic.

Statutes of limitations "are technical defenses which should be strictly construed to avoid the forfeiture of a plaintiff's rights." (*Arlayna Samuels v. Terence J. Mix* (1999) 22 Cal.4<sup>th</sup> 1, 21, quoting *Steketee v. Lintz Williams & Rothberg* (1985) 38 Cal.3d 46, 56.) While statutes of limitations serve a critical function in filtering out stale claims, we must ensure that the claim is indeed stale under the applicable standard. Under Board precedent governing statutory tolling, where the grievant actively pursues the grievance immediately following notice of the adverse action,<sup>16</sup> the statute of limitations would not begin to run or accrue until the grievance machinery has been exhausted and the possibility of a remedy via the grievance procedure foreclosed. A charging party will not be precluded from proceeding on an untimely charge if he or she has pursued a grievance through the grievance machinery in good faith, and tolling will not cause surprise or prejudice to the respondent. Until the grievance machinery is exhausted, the

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<sup>16</sup> A grievance is considered "actively pursued" during the time in which the grievant is engaged in efforts preparatory to filing, e.g., making contact and meeting with the exclusive representative, investigating and interviewing witnesses, preparing the grievance including necessary documentation, because such preparatory efforts are "an inherent and necessary part of a complainant's pursuit of his or her grievance." (*Los Angeles Unified School District* (1983) PERB Decision No. 311 [statute of limitations tolled where the grievant promptly contacted the exclusive representative upon receiving notice of adverse action and grievance was submitted within 15 working days from receipt of notice pursuant to the contractual grievance procedure].) Where, however, during the time following notice of adverse action, the charging party is not engaged in efforts "reasonably related" to the pursuit of the grievance machinery but is instead "sitting idly on his rights," the statute will not be tolled. (*Ibid.*; *California School Employees Association (Spiegelman)* (1984) PERB Decision No. 400 [statute of limitations not tolled where the grievant knew the exclusive representative was not pursuing the grievance].)



respondent is on notice that the claim is still alive and should therefore take whatever steps necessary to preserve documents and secure witnesses. So long as the grievance and the later-filed unfair practice charge raise the same issue and the unfair practice charge is filed within six months of exhaustion of the grievance machinery, the respondent can claim neither prejudice nor surprise.

Accordingly, we decline to adopt the ALJ's proposed dismissal and instead order the record re-opened for the taking of further evidence on the statutory tolling issue. (PERB Reg. 32320, subdivision (a)(2).)<sup>17</sup> If ultimately Brown's complaint and charge are dismissed on timeliness grounds because the statute of limitations is not subject to a period of tolling long enough to bring the filing of the unfair practice charge within the six-month limitations period, we will have done so on a fully developed evidentiary record.<sup>18</sup>

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<sup>17</sup> The District is correct that only those matters contained in the record of the case may be referred to in the statement of exceptions. (PERB Reg. 32300, subd. (b).) While Brown stated that he has documents relevant to the timeliness issue, he neither identified them nor disclosed their content. Our decision is based on our review of the hearing record and determination that the evidentiary record is inadequate, not on any supposition about what particular light Brown's documents may shed on the tolling issue.

<sup>18</sup> This case raises the question whether the District should be equitably or judicially estopped from raising the statute of limitations as an affirmative defense. Given the remand, we need not decide this issue. Taking official notice of the case file, we believe, however, this question deserves a comment. "Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4<sup>th</sup> 171, 181 [internal citations omitted].) It focuses on the relationship between the litigant and the judicial system and is also referred to as the doctrine of preclusion of inconsistent positions. It may be invoked to "prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process." (*Id.* at pp. 181-182.) Equitable estoppel focuses on the relationship between the parties and may be invoked to prevent a party from changing positions where there has been reliance on that party's prior position and prejudice would result if the court permitted the change in position. (*Id.* at p. 182.)

In the charge processing and investigation proceedings before the Office of the General Counsel, the District argued that the unfair practice charge was barred by the statute of limitations but also argued that Brown was attempting to adjudicate an "identical" claim in two different

## 2. Overturning *Long Beach II*

The District is correct that under *Long Beach II*, *supra*, PERB Decision No. 2002 and its progeny, the burden to establish timeliness has been placed on the charging party. Establishing

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fora. The District filed a position statement under penalty of perjury on March 15, 2012, which states:

Shortly after receiving the Notice of Non-Reelection, on March 14, 2011, Brown filed a grievance alleging that LAUSD violated portions of the collective bargaining agreement with UTLA by issuing Brown a below standard Stull Evaluation. (See Exhibit 2 Brown Grievance Form #2010-100189 attached hereto.) *This grievance is currently with the UTLA Grievance Review Committee.* Brown's non-reelection became effective on the last day of the 2010-2011 school year. Brown's Charge is essentially identical to his grievance and, thus, it appears that by filing the instant Charge, Brown is simply seeking a different avenue for his complaints.

(Emphasis supplied.)

This hints at the possibility that the District did not consider the grievance machinery exhausted or the possibility of a remedy via the grievance procedure foreclosed in the position it took before the Office of the General Counsel. That the grievance may not have died when Brown failed to take the grievance to Step Two is also hinted at by another document in the case file, a letter dated October 14, 2010 [sic] from the exclusive representative to District Field Director Dr. Howard Saxe regarding Grievance #2010-100189. It states that the "above-referenced matter has been referred to your office under the provisions of Article V, Section 8.0 of the Collective Bargaining Agreement." Because the letter references a filing date for grievance #2010-100189 of "03/14/11," we assume for purposes of this comment that the correct date of the letter is October 14, 2011, not 2010. If that is the case, the unfair practice charge was filed approximately four months later.

We recognize that none of the foregoing is currently in "evidence" and therefore cannot be considered at this time for purposes of determining whether Brown's unfair practice charge is timely. It is, however, relevant on the issue of judicial and equitable estoppel, which looks at contrary or inconsistent positions a party has taken outside the proceedings in question. To the extent the Office of the General Counsel relied on the District's position that Brown's grievance "is currently with the UTLA Grievance Review Committee" in applying the statutory tolling exception to the statute of limitations and issuing the complaint, the District's arguably contrary position in the administrative adjudication that the grievance was closed or withdrawn on the last day Brown had the opportunity to appeal the Step One denial to Step Two raises some concern. We are ordering that the record be re-opened for the taking of further evidence because the better choice under the circumstances is to allow the statute of limitations defense to be fully tried and the evidentiary record fully developed rather than deprive the District of its timeliness defense based on principles of estoppel.

timeliness is considered part of the charging party's "prima facie" burden during charge processing as well as during the administrative adjudication of the charge following issuance of the complaint. For reasons discussed below, we depart from that precedent with this decision.

#### A. THE EVOLUTION OF BOARD PRECEDENT

##### I. The Statute of Limitations is Not Jurisdictional; it is an Affirmative Defense.

In *Walnut Valley Unified School District* (1983) PERB Decision No. 289 (*Walnut Valley*), the Board cited well-established principles of California law and law developed by the federal courts and the National Labor Relations Board under the National Labor Relations Act (NLRA)<sup>19</sup> in holding that the statute of limitations is not jurisdictional, but rather a personal privilege that must be affirmatively invoked by appropriate pleading. As an affirmative defense, if it is not raised in a timely fashion, it is waived. This view of the statute of limitations as an affirmative defense prevailed until at least 1987. (See *California State University, Hayward* (1987) PERB Decision No. 607-H.)

##### II. The Statute of Limitations is Jurisdictional; it is Not an Affirmative Defense.

In *Lake Elsinore School District* (1987) PERB Decision No. 646 (EERA) and *California State University, San Diego* (1989) PERB Decision No. 718-H (HEERA),<sup>20</sup> the Board reversed itself concluding that the statute of limitations is a jurisdictional bar to charges filed outside the six-month limitations period. The Board reasoned that because the statute "prohibits" PERB from issuing a complaint concerning conduct occurring over six months before the filing of the charge, the Board would act in excess of its jurisdiction if it were to do so. Addressing the respondent's "burden," the Board held:

While procedurally it is appropriate to have the respondent call to the Board's attention that the charge was not timely filed, its failure

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<sup>19</sup> The NLRA is codified at 29 U.S.C. section 151 et seq.

<sup>20</sup> The Higher Education Employer-Employee Relations Act (HEERA) is codified at section 3560 et seq.

to do so cannot be used as a basis for expanding the Board's jurisdiction.

In support of its conclusion that the statute of limitations constitutes a jurisdictional bar, the Board reasoned that the threat of disruption of collective bargaining relationships is prolonged when the time during which an unfair practice charge may be asserted is extended. According to the Board, viewing the statute of limitations as anything but an absolute bar is antithetical to the goal of promoting harmonious labor relations.

### III. Establishing Timeliness of the Charge is Part of Charging Party's Prima Facie Burden.

In *Regents of the University of California* (1990) PERB Decision No. 826-H, the Board held, "we agree with the ALJ that as a result of *California State University, San Diego*, the burden is on the charging party to show timeliness as part of its prima facie case." (*Regents of the University of California, supra*, PERB Decision No. 826-H, p. 5, fn. 6.) The ALJ, however, explained the burden distribution as follows:

Even if [the statute of limitations] were still considered an affirmative defense, it would be concluded that once Respondent has properly raised that defense, and established that the alleged [conduct] took place outside the six-month period, the burden would shift to the [union] to establish that it did not learn of the change or the reasons therefore until a date within the six-month period, or that the statute should be tolled.

(*Id.*, proposed decision, at p. 27.)

The Board concluded that "[a]s a jurisdictional matter, it is clearly the [union's] burden to establish timeliness as part of its prima facie case." What this meant in practical terms was that the statute of limitations need not be raised by the respondent in order to preserve it as an issue for trial. It could not be waived by the parties. This view of the statute of limitations as a jurisdictional bar, not capable of being waived by the parties and also part of charging party's prima facie burden prevailed until 2003.

IV. The Statute of Limitations is Not Jurisdictional; it is an Affirmative Defense.

In *Long Beach Community College District* (2003) PERB Decision No. 1564

(*Long Beach I*), the Board reversed itself again. The timeliness issue was raised in the context of a tolling argument. A byproduct of characterizing the statute of limitations as a jurisdictional bar was the elimination of the doctrine of equitable tolling. In *Long Beach I*, the Board reinstated the equitable tolling doctrine and, in so doing, returned to the view that the statute of limitations is not jurisdictional, but an affirmative defense that can be waived.

The Board stated that the Legislature “fully intended to model EERA, and its related Acts,” after the NLRA. As the Board stated, “[a]s the statute of limitations under the NLRA has long been held not to be jurisdictional, the Board believes that the Legislature intended a similar rule under EERA.” The Board compared the operative language of EERA with the NLRA, which shows substantial similarity. EERA section 3541.5, subdivision (a)(1) provides that the Board shall not:

Issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

Section 10(b) of the NLRA, by comparison, provides:

Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.

The Board observed that in interpreting section 10(b), the NLRB has long held that the statute of limitations is not jurisdictional, but is an affirmative defense that must be timely raised in the answer or it is waived. The Board also disagreed with the analysis in *California State University, San Diego, supra*, PERB Decision No. 718-H, discussed above, on its two most fundamental points. According to the Board in *Long Beach I, supra*, PERB Decision No. 1564, the word “shall” does not necessarily mean “mandatory.” Also, interpreting the statute of

limitations as jurisdictional discourages the use of bilaterally agreed-upon grievance procedures and therefore is not sound public policy.

V. Notwithstanding that the Statute of Limitations is an Affirmative Defense, it is Still Charging Party's Initial Burden at the Charge Investigation Stage to Allege Facts Sufficient to Establish Timeliness of the Charge.

In *SEIU Local 1000 (George)* (2008) PERB Decision No. 1984-S, the Board agent stated in the dismissal letter that “charging party bears the burden of demonstrating that the charge is timely filed.” The Board provided the following clarification:

The Board agent's dismissal appears to suggest that a charging party's burden to allege facts to establish the timeliness of a charge at the investigative stage arises only after a respondent has raised the statute of limitations as an affirmative defense. However, the Board has long held that in order to state a prima facie case, a charging party must allege sufficient facts to demonstrate that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

VI. The Statute of Limitations is not Jurisdictional but it is Not a “True” Affirmative Defense.

*Long Beach II*, *supra*, PERB Decision No. 2002, affirmed the holding in *Long Beach I* that the statute of limitations is not jurisdictional. In a section of the decision entitled “Type of Defense,” the *Long Beach II* Board, however, disagreed with the statement in *Long Beach I* that the statute of limitations “must be raised as an affirmative defense.” The statute of limitations “is not a true affirmative defense but instead an element of the charging party's prima facie case.”

*Long Beach II* reviewed Code of Civil Procedure section 431.30(b) governing the two types of defenses that may be raised in an answer to a complaint, one of which is the affirmative defense, recognizing that an affirmative defense absolves a defendant of liability even if the plaintiff has proven all of the necessary elements of its claim. In so doing, an affirmative defense raises a new matter extraneous to the prima facie case. The Board acknowledged that in most civil actions, timeliness is not part of the plaintiff's prima facie case and therefore the plaintiff

does not have to plead timeliness in its complaint. In such cases, the statute of limitations is an affirmative defense that the defendant must plead in its answer and prove by a preponderance of the evidence.

Unlike most civil actions, *Long Beach II* explained that “timeliness is part of the charging party’s prima facie case in PERB unfair practice proceedings.” *Long Beach II* held:

As a result, the statute of limitations is not a *true* affirmative defense because it negates an element of the prima facie case rather than establishing a defense based on matters outside the prima facie case.

(Emphasis supplied.)

*Long Beach II* viewed *Long Beach I* as restoring the rule in *Walnut Valley, supra*, PERB Decision No. 289, which “appears to have changed PERB’s prior practice regarding the statute of limitations.” This characterization of the Board’s “prior practice” is based on the failure of the Board in *San Dieguito, supra*, PERB Decision No. 194 to mention anything about the respondent having the burden to prove that the charge was untimely filed. Based on that omission alone, the Board declared, “Thus, before *Walnut Valley*, PERB seems to have required the charging party to prove timeliness as part of its prima facie case at hearing.” The Board stated:

The Board’s restoration of the *Walnut Valley* rule in *Long Beach CCD I* has created a system where PERB considers timeliness part of the prima facie case at the charge stage, but once a complaint issues it is no longer part of the prima facie case but instead an affirmative defense that the respondent must raise in its answer and prove by a preponderance of the evidence at hearing. This shifting of the burden of proof on timeliness is contrary to the Legislature’s allocation of the burden of proof in civil proceedings as set forth in Evidence Code section 500, which states that “a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” The Law Revision Commission Comment states that Evidence Code section 500 follows the basic rule “that whatever facts a party must affirmatively plead he also has the burden of proving.”

Because the current *Walnut Valley* scheme is contrary to this fundamental principle, we overrule *Walnut Valley* and its progeny, including *Long Beach CCD I*, to the extent those cases hold that the respondent bears both the burden of pleading the statute of

limitations as an affirmative defense in its answer and the burden of proving at hearing that the charge was untimely. PERB's approach before *Walnut Valley*, as exemplified in *San Dieguito*, was consistent with Evidence Code section 500 because it required the charging party to prove at hearing what it alleged in its charge. Accordingly, we hold that the charging party bears the burden of proving by a preponderance of the evidence that the charge was filed within the six-month statute of limitations period.

(Fns. omitted.)

## B. THE STATUTE OF LIMITATIONS UNDER THE NLRA

Under the NLRA, the statutory provision setting out a six month filing period is considered a statute of limitations rather than a jurisdictional bar. As stated by the NLRB in *Chicago Roll Forming Corp* (1967) 167 NLRB 961, 971:

[T]he proviso to Section 10(b) of the Act is a statute of limitations, and is not jurisdictional. It is an affirmative defense, and if not timely raised, is waived. The Respondent Employer had adequate opportunity to raise it, but has declined to do so. It has waived this procedural defense, and has elected to defend on the merits. For these reasons, the complaint is valid against the Respondent Employer, and is not barred by the Section 10(b) proviso.

(Fns. omitted.) As stated by the court in *NLRB v. A.E. Nettleton Co.* (1957) 241 F.2d 130, 133:

[T]he Proviso does not impose a jurisdictional limitation upon the Board, but is a statute of limitations. That a statute of limitations may be waived is elementary. No extraordinary circumstances to excuse its waiver appear in the record. We cannot sustain the contention that procedural defects require a dismissal, remand, or modification of the Board's order.

## C. THE STATUTE OF LIMITATIONS AND THE BURDEN OF PROOF UNDER CALIFORNIA LAW

Burden of proof<sup>21</sup> encompasses two burdens, the primary burden of proving a particular fact and the secondary burden of initially going forward with evidence. (1 Witkin, Cal. Evidence

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<sup>21</sup> As defined in a treatise on evidence:

"Proof" is an ambiguous word. We sometimes use it to mean evidence, such as testimony or documents. Sometimes when we say a thing is "proven" we mean that we are convinced by the data



(5<sup>th</sup> ed. 2012) Burden of Proof and Presumptions, § 1, p. 174.) Evidence Code section 110 describes the secondary burden as “the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.” Evidence Code section 500 describes the primary burden, also referred to as the burden of persuasion, as the “obligation of the party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.” PERB Regulation 32178, which establishes the requisite degree of proof required in unfair practice cases, provides that, “[t]he charging party shall prove the complaint by a preponderance of the evidence in order to prevail.”<sup>22</sup>

Regarding the allocation of the burden of proof, the basic rule is that “whatever facts a party must affirmatively plead, the party also has the burden of proving.” (1 Witkin, Cal. Evidence (5<sup>th</sup> ed. 2012) Burden of Proof and Presumptions, § 6, p. 177.) As described in a treatise on evidence:

In most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well. The pleadings therefore provide the common guide for apportioning the burden of proof.

(2 McCormick, Evidence (7<sup>th</sup> ed. 2013) Burden of Proof and Presumptions, § 337, p. 645.)

At the outset of a case, the secondary burden of initially going forward with evidence coincides with the primary burden of proof or persuasion. (Evid. Code, § 550, Law Revision Commission Comments.) The party having the burden of proof must offer evidence so that the trier may have a basis for finding in his favor. (9 Wigmore, Evidence (Chadbourn ed. 1981) § 2487, p. 293.) During the course of trial, the secondary burden of going forward with evidence

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submitted that the alleged fact is true. Thus, “proof” is the end result of conviction or persuasion produced by the evidence.

(2 McCormick, Evidence (7<sup>th</sup> ed. 2013) Burden of Proof and Presumptions, § 336, p. 644.)

<sup>22</sup> Proof by a preponderance of the evidence requires a party to convince the trier of fact that the existence of a particular fact is more probable than its nonexistence. (Evid. Code, § 500, Law Revision Commission Comments.)

may shift from one party to another, “irrespective of the incidence of the burden of proof.”

(Evid. Code, § 550, Law Revision Commission Comments; *Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 880.)

The allocation of the primary burden of proof is described in Evidence Code section 500, which provides: “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” Under Evidence Code section 500, the burden of proof as to a particular fact “is normally on the party to whose case the fact is essential.” (Evid. Code, § 500, Law Revision Commission Comments.)

The allocation of the burden of proof sometimes varies from the general rule described above. In determining whether the normal allocation of the burden of proof should be altered, courts consider the following factors:

[T]he knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact.

(Evid. Code, § 500, Law Revision Commission Comments.)

“As a general rule, the burden is on the defendant to prove new matter alleged as a defense [citations] even though it requires the proof of a negative.” (*Wilson v. California Cent. R.R.* (1892) 94 Cal. 166, 172.) The statute of limitations is one such defense or “new matter.”<sup>23</sup> It is considered a personal privilege that is waived if not timely raised. (5 Witkin, Cal. Procedure (5<sup>th</sup> ed. 2008) Statute of Limitations, § 1117, p. 543.) Under California law, “a defendant must prove facts necessary to enjoy the benefit of a statute of limitations.” (*Arlayna Samuels v. Terence J. Mix, supra*, 22 Cal.4<sup>th</sup> 1, 10.)

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<sup>23</sup> “The statement of any new matter in the answer, in avoidance or constituting a defense, shall, on the trial, be deemed controverted by the opposite party.” (Code Civ. Pro., § 413.20, subd. (b).)

Thus, in a civil action, the defendant has the burden to demur to the complaint on the grounds of statute of limitations or to plead statute of limitations as an affirmative defense in the answer.<sup>24</sup> In addition, the defendant has the burden of proof. (*Rancho Santa Fe Pharmacy, Inc. v. Seyfert*, *supra*, 219 Cal.App.3d 875, 880.)

The policy of handicapping a disfavored contention probably accounts for the requirement that the defendant generally has all three burdens [pleading, producing evidence and persuading the trier of fact] with regard to such matters as . . . statute of limitations . . . .

(2 McCormick, Evidence (7<sup>th</sup> ed. 2013) Burden of Proof and Presumptions, § 337, p. 649.)

#### D. ANALYSIS

ALJs and litigants in PERB proceedings are placed in a confusing bind on the statute of limitations issue by the question left unanswered in *Long Beach II*, *supra*, PERB Decision No. 2002. If the statute of limitations is not a “true” affirmative defense, if it need not be raised by the respondent as an affirmative defense, and if charging party carries the burden of proof, then what kind of defense is it?

It is long settled that the statute of limitations is not a jurisdictional bar to an untimely unfair practice charge. *Long Beach II* did nothing to disturb that rule of law. Further reflection on that issue is not warranted. We focus instead on the allocation of the burden of proof on the statute of limitations issue. In concluding that the statute of limitations under PERB law is not a true affirmative defense, the Board in *Long Beach II* created a tension between our understanding of the statute of limitations as a defense to an unfair practice charge and our understanding of charging party’s prima facie burden. That *Long Beach II* deposited this tension into the state of the law is demonstrated by the fact that respondents, like the District here, continue to raise the

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<sup>24</sup> The answer to a complaint shall contain general or specific denials of the material allegations of the complaint controverted by the defendant and a statement of any new matter constituting a defense. (Code Civ. Proc., § 431.30, subd. (b).)

statute of limitations as an affirmative defense in the answer to a complaint even though *Long Beach II* relieved respondents of that pleading burden.

In *Long Beach II*, the Board failed to take into consideration a material difference between civil actions and unfair practice charges. In civil actions, there are typically two parties and a trier of fact. In unfair practice charge proceedings, there are also two parties and a trier of fact, but the role of the Office of the General Counsel is pivotal. Under the statutory framework, it is the Office of the General Counsel who is prohibited from issuing a complaint based on conduct outside the six-month limitations period. It is the Office of the General Counsel whose responsibility it is to determine whether the charge should be dismissed based on timeliness grounds.

The primary way in which the statute of limitations has come to be viewed as the charging party's burden, even though its relevance under the statutory scheme is purely limited to PERB's authority to issue a complaint, is through the bundling of the timeliness issue with the prima facie case. The prima facie elements of an unfair practice charge and the timeliness of that charge are distinct in concept and purpose. The untimeliness of a charge is a procedural defect, which if proven allows the respondent to escape liability notwithstanding the merits of the charge. The elements of the prima facie case speak to the merits of the unfair practice charge, which if proven allows the charging party to seek a remedy to right a particular wrong. That the prima facie case and the timeliness issue are conceptually distinct and separate is recognized in PERB Regulation 32620, subdivision (b)(4), which describes the power and duties of the Board agent in the processing of an unfair practice charge. It provides, in pertinent part:

(b) The powers and duties of such Board agent shall be to:

(4) Make inquiries and review the charge and any accompanying materials to determine whether an unfair practice has been, or is being, committed, and determine whether the charge is subject to deferral to arbitration, or to dismissal for lack of timeliness.

In processing a charge, the Office of the General Counsel typically determines at least two fundamental issues: (1) whether the charging party has set forth the prima facie elements of an unfair practice charge with sufficient factual specificity and supporting evidence; and (2) whether the charge was timely filed within the six-month limitations period or whether one of the many non-statutory exceptions applies. Where the Office of the General Counsel issues a complaint, it necessarily means that it made both of those determinations in charging party's favor. The Office of the General Counsel may not evaluate the underlying merits of the prima facie case. By contrast, it is required by statute to make an actual determination whether the charge is timely and, for that matter, whether it is subject to deferral.

The role of the Office of the General Counsel in the determination of the timeliness of a charge makes unfair practice charges sufficiently distinct from civil actions to undermine the Board's rationale in *Long Beach II*, *supra*, PERB Decision No. 2002. The Board in *Long Beach II* reasoned that because the statute of limitations is part of charging party's prima facie burden, it is not "new matter" constituting a true affirmative defense. As explained above, the bundling of the timeliness issue with the prima facie elements of an unfair practice charge did in fact occur but not for reasons grounded in the statutory scheme. Moreover, because the Office of the General Counsel necessarily has already made a timeliness determination by the time the complaint has issued, the statute of limitations does in fact become "new matter" for purposes of the formal hearing.

The Board in *Long Beach II* stated that imposing on the charging party the burden of proving timeliness is consistent with Evidence Code section 500 because "it requires the charging party to prove at hearing what it alleged in the charge." As explained, we do not accept the premise that the timeliness issue and the prima facie elements of an unfair practice are equivalent.

More importantly, the parties do not litigate the allegations of *the charge* at the formal hearing. They litigate the allegations in *the complaint*. When the Office of the General Counsel issues a complaint, it has the discretion to decide which allegations and legal theories to assert and what violations to include. Because it is the Office of the General Counsel that issues the complaint, and the complaint replaces the charge as the operative pleading, we see no reason to depart from time-honored principles developed by the courts regarding the statute of limitations in determining the proper allocation of the parties' respective burdens for administrative adjudication purposes.

Given that the running of the statute of limitations is a procedural defect that prevents the trier of fact from deciding a case on its merits, it should be carefully and conscientiously applied. At the charge investigation stage, it is incumbent on charging party to provide sufficient factual allegations and supporting evidence to allow the Office of the General Counsel to determine that a *prima facie* violation of an unfair practice has been set forth and the unfair practice charge was timely filed. Upon making those determinations, the Office of the General Counsel concludes its statutory role in its issuance of a complaint. At that point, the statute of limitations becomes a "true" affirmative defense. As the Board had required prior to *Long Beach II*, the statute of limitations is waived if not timely raised as an affirmative defense in the answer to the complaint. Following the "common guide" provided by the pleadings, we hold that (1) the burden of going forward with evidence and the burden of proving the issues with respect to the unfair practices alleged in the complaint continue to be imposed on the charging party; (2) the burden of going forward with evidence and the burden of proving the issues with respect to any affirmative defenses or "new matters" raised in the answer are henceforth imposed on the respondent; and (3) thus, the respondent has the burden to plead and prove that the unfair practice charge is barred by the statute of limitations.

Where the issue of equitable or statutory tolling arises, as here, the question becomes whether the burden of proof remains with the respondent or shifts to the charging party. In some civil law contexts, the burden shifts to the plaintiff to demonstrate that the claim survives based on one or more non-statutory exceptions to the statute of limitations. (See, e.g., *Arlayna Samuels v. Terence J. Mix*, *supra*, 22 Cal.4<sup>th</sup> 1, 11.) In determining whether the normal allocation of the burden of proof should be altered, relevant factors include the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact. (Evid. Code, § 500, Law Revision Commission Comments.)

Applied in the tolling context, these factors tip in favor of allocating to the respondent the burden of proving that the tolling exception does not apply. Regarding the knowledge factor, commonly the parties in control of the grievance process are the employer and the exclusive representative. This case is no different. Wada's Step One denial was addressed to the exclusive representative. Brown, the individual grievant, was not copied on the letter. He testified that he never received it. Wada testified that communications concerning grievances are between the District and the exclusive representative. As between Brown and the District, the District has greater knowledge concerning the status of the grievance, i.e., whether the grievance machinery has been exhausted and any remedy via the grievance procedure foreclosed.

Regarding the availability of evidence factor, again the employer and the exclusive representative commonly are the parties in control of the grievance process and therefore are the parties most likely to possess evidence regarding the status of the grievance. Here, for example, under the CBA, only the District and the exclusive representative may agree to extend, shorten or

waive any step or timeline in the grievance process. As between Brown and the District, evidence of the status of a grievance is distinctly within the possession of the District.

Regarding the public policy factor, the most desirable result in the absence of proof of timeliness is a decision on the merits of the complaint. Because a successful statute of limitations defense bars PERB from determining whether an unfair practice occurred, the burden of proof belongs on the party who has the strongest interest in making that case, i.e., the respondent. Unfair practices have a destabilizing effect on the workplace. Unfair practices that are not remedied have a far worse effect. Public policy, therefore, supports allocating to the respondent the burden of proving that the tolling exception does not apply.

The final factor in considering whether to alter the allocation of the burden of proof on the tolling issue is the probability of the existence or nonexistence of the fact. We return to an earlier point. By the time a complaint has issued, the Office of the General Counsel necessarily has already determined that the charge was timely filed either on the basis that the underlying conduct occurred within six months of the filing of the unfair practice charge or that an exception to the statute of limitations applies. Therefore, at the point of complaint issuance, the greater probability is that the unfair practice charge was in fact timely filed.

Thus, in consideration of the above factors, and using the facts of this case to illustrate the point, we hold that the allocation of the burden of proof on the tolling issue need not be altered from the newly announced framework. The burden of proving the timeliness issue includes the burden of proving both that the unfair practice charge was filed outside the six-month limitations period and that the tolling exception does not apply. That burden rests with the respondent.

In sum, we conclude that the evidentiary record in this case is insufficient on the tolling issue. We therefore remand this case to the ALJ. We order that the record be re-opened for the taking of further evidence on the tolling issue and that a new proposed decision issue consistent



with the Board's decision herein, which, in a sentence, holds that the statute of limitations is once again a "true" affirmative defense.

#### ORDER

The Board REVERSES the administrative law judge's dismissal of the complaint and the unfair practice charge in Case No. LA-CE-5656-E, REMANDS the case to the administrative law judge and ORDERS that the record be re-opened for the taking of further evidence on the tolling issue only and that a new proposed decision issue consistent with this Decision.

Members Huguenin, Winslow and Banks joined in this Decision.